



Paper No. 5

David S. Bir
Brooks & Kushman P.C.
22nd Floor
1000 Town Center
Southfield, MI 48075-1351

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OFFICE OF PETITIONS

In re Application of
Hansen
Application No. 10/085,287
Filed: February 28, 2002
Attorney Docket No. KLH 0105 PUS

DECISION ON PETITION

This is a decision on the petition filed June 6, 2002, requesting, in effect, that page 7 of the drawings (Figure 11) filed on June 6, 2002, be entered as part of the original disclosure.

The petition is **dismissed**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are NOT permitted. This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The application was filed on February 28, 2002. On March 26, 2002, the Office of Initial Patent Examination mailed a Notice stating that the application had been accorded a filing date of February 28, 2002, and advising applicants that Figure 11 appeared to have been omitted.

In response, the present petition was filed. Petitioner alleges Figure 11 was filed with the original application.

All the evidence present in the file has been carefully considered, but is not persuasive that Figure 11 was submitted with the original application.

The last portion of MPEP 513 states,

Where there is a dispute as to the contents of correspondence submitted to the Office (e.g., an applicant asserts that three sheets of drawings were submitted under 37 CFR 1.10 with an application, but the Office records indicate receipt of only two sheets of drawings with the application) ... The Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g. a postcard receipt

While petitioner apparently believes that Figure 11 was filed on February 28, 2002, the file of application No. 10/085,287¹ shows that Figure 11 was not received, since no such paper is present in the file. An applicant alleging that a paper was filed in the USPTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The evidence presented with the petition does not have more probative value than the official government record of what was actual received in the USPTO on February 28, 2002.

¹ The file contains the actual papers received and the file is an official government record prepared and maintained by disinterested USPTO employees as a part of their customary and usual duties.

It is for this reason that the USPTO has established a practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice, which has been in existence for many years and is well publicized, requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual Of Patent Examining Procedure (MPEP 503).

Petitioner has only demonstrated an intent to file Figure 11 and has not established that the Figure 11 was actually filed. Unfortunately, patent applicants and their representatives, who intend to file complete applications, occasionally file applications which are missing one or more pages, due to clerical error, a copying machine error (such as papers sticking together), papers falling out of a file, or another reason. A demonstration of an intent to include a page or pages does not establish the actual receipt of such pages by the Office.

Since applicants have not filed a petition under 37 CFR 1.182 requesting June 6, 2002, the date the missing pages were filed, as the filing date, Figure 11 filed on June 6, 2002, will not be entered.

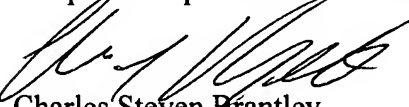
An amendment to the specification deleting references to the missing pages should be filed prior to the first USPTO action in order to avoid further delays in the examination of the application. *In the alternative*, if petitioner desires for the examiner to consider pages which were not submitted as part of the original disclosure, then petitioner may seek to submit some or all of those pages as an amendment. Any such amendment will, of course, be reviewed by the examiner for new matter. See MPEP 608.02(a). The amendment is not new matter if the substance was a part of the disclosure of the prior application and the matter was incorporated by reference.

It is noted that the first paragraph of the specification cites an application and a patent and states, "the disclosures of which are hereby incorporated by reference in their entirety." MPEP 201.06(c) states that:

... an applicant may incorporate by reference the prior application by including, in the application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The statement may appear in the specification or in the application transmittal letter. The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition. (emphasis supplied)

The file will be returned to the Office of Initial Patent Examination for further processing with a filing date of February 28, 2002, using only the application papers filed on that date.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683.



Charles Steven Brantley
Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy